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Supreme Court, U.S.
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In The

# Supreme Court of the United States

KRISTOPHER OKWEDY and
KEYWORD MINISTRIES, INC.,

*Petitioners,*

v.

GUY V. MOLINARI, individually and in his official capacity as President of the Borough of Staten Island, New York, PNE MEDIA, LLC,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the City of New York violated the Establishment Clause prohibition against hostility toward religion when it condemned a message on a billboard containing quotes taken directly from the Bible as "bigoted," "intolerant" and "unwelcome," and as conveying "bigoted views," among other things?

## PARTIES TO THE PROCEEDING

Petitioners are Rev. Kristopher Okwedy, an ordained minister, and Keyword Ministries, Inc., a not-for-profit corporation organized and existing under the laws and constitution of the State of New York (collectively, "Okwedy"). Respondent is the City of New York, New York.[1]

[1] Petitioners had originally sued Guy V. Molinari, then President of the Borough of Staten Island, in both his official and individual capacities, and PNE Media, LLC. The claims against Mr. Molinari in his individual capacity were subsequently dismissed, and Petitioners settled their claims against PNE.

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## PETITION FOR A WRIT OF CERTIORARI

The undersigned counsel of record, on behalf of petitioners Kristopher Okwedy and Keyword Ministries, Inc., respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The initial opinion of the district court is reported at 150 F.Supp.2d 508 (E.D.N.Y. 2000). On the first appeal, the Second Circuit issued two opinions of which one is reported at *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003); the second was unreported, but may be found at 69 Fed.Appx. 482, 2003 WL 21492487 (2d Cir. 2003). The opinion of the district court after remand is unreported. The Second Circuit's summary order may be found at 2006 WL 2374263 (2d Cir. 2006).

## JURISDICTION

The judgment of the court of appeals was entered on August 15, 2006. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution, which has been held to apply against the States and their political subdivisions, provides in relevant part that

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . . " The pertinent provisions of the City's Human Rights Law, N.Y.C. Admin. Code § 8-101 et seq., are as follows:

> In the city of New York, . . . there is no greater danger to the health, morals, safety, and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, . . . sexual orientation. . . . The council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination . . . threaten the rights and proper privileges of its inhabitants and menace the institutions and foundations of a free democratic state.

*See* App. 25 (Opinion and Order at 5).

## STATEMENT

This case involves the tension between a policy prohibiting discrimination on the basis of sexual orientation and religious speech describing homosexual conduct as sinful. Acting pursuant to a general policy against discrimination and, according to the repeated representations of the City's legal counsel, pursuant to its Human Rights Law,[2] the City condemned Okwedy's religious message.

[2] The City maintained this position consistently throughout five years of litigation. *See, e.g.*, App. 22, 58. On the second appeal, however, the City suddenly reversed itself and contended that the representations of counsel were inadvertent, and that it had not acted pursuant to

(Continued on following page)

Indeed, the City admitted without reservation that its "actions had the intended secular effect of curtailing intolerant pronouncements to the general populace of Staten Island." App. 58.

Okwedy's message was contained on two billboards he rented on Staten Island, on which the following was expressed:

> *Word on the Street*
>
> 4 WAYS TO SAY LEVITICUS 18:22
>
> THOU SHALL NOT LIE WITH MANKIND AS WITH WOMANKIND; IT IS ABOMINATION (KING JAMES)
>
> YOU SHALL NOT LIE WITH A MALE AS WITH FEMALE; THAT WILL BE LOATHSOME (JAMES MOFFAT)
>
> DO NOT LIE WITH A MAN AS WITH A WOMAN; IT IS DETESTABLE (BERKLEY VERSION)
>
> HOMOSEXUALITY IS ABSOLUTELY FORBIDDEN FOR IT IS AN ENORMOUS SIN (LIVING BIBLE)
>
> ***I AM YOUR CREATOR.***[3]

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§ 8-101. The Second Circuit accepted the City's argument and ruled that § 8-101 was not implicated here. *See* 2006 WL 2374263 at *1 (finding statements of defense counsel were "legal theories rather than facts"). Okwedy disputes that ruling, but asserts that regardless whether the policy is rooted in § 8-101 or in the City's general policy against discrimination, its actions constituted a violation of the Establishment Clause and/or Okwedy's Free Speech and Free Exercise rights.

[3] *Okwedy v. Molinari*, 333 F.3d 339, 341 (2d Cir. 2003).

The billboards were posted in early March, 2000. Within days, Molinari joined a growing chorus of offended citizens and publicly declared the signs "mean-spirited." *See, e.g.*, 35, 38, 41. Shortly thereafter, Molinari faxed a letter to PNE, the owner of the billboard, on official Staten Island letterhead and signed in his capacity as Borough President, stating that the quoted Bible verse "is commonly invoked as a biblical prohibition against homosexuality." The letter also stated that he and others found the message "unnecessarily confrontational and offensive." He then wrote: "As Borough President of Staten Island I want to inform you that this message conveys an atmosphere of intolerance which is not welcome in our Borough." App. 9-10 (Opinion and Order at 2-3). He further stated that PNE owned "a number of billboards on Staten Island," and derived "substantial economic benefits" from them, and urged PNE to contact Daniel Master, Molinari's legal counsel and Chair of his Anti-Bias Task Force. *Id.*

Prior to sending the letter, Master and others in Molinari's office had placed numerous phone calls to PNE to discuss the content of the billboards, but were unable to reach a representative.

Subsequent to Molinari's public comments and the same day Molinari's letter was sent, PNE removed the billboards, breaching its contract with Okwedy. PNE also released Pastor Okwedy's name to the media, resulting in a frenzy of calls, interviews, and hate mail. App. 29. Okwedy was insulted, threatened, and sent a suspicious package he and his wife believed might contain a bomb. When he contacted the City police, however, they refused

to come investigate, instructing him instead to simply open the package.[4] App. 28.

Once Okwedy's name was revealed, the City sent two detectives from the Bias Crimes Unit to Keyword Ministries. Although Rev. Okwedy was not there, the two interrogated Okwedy's wife and brother-in-law about the church's doctrines and teachings on the subject of homosexuality. App. 26-29, 32-34. The inquiry was prompted by complaints about the biblical quotes on Okwedy's signs, and was investigated as a possible hate crime. *Id.* The men made offensive comments about Rev. Okwedy's national origin (Nigeria), and asked why Keyword Church placed the Bible verse on the billboards. *Id.* Although Rev. Okwedy had received threatening messages and even death threats,[5] these police officers never asked about them. App. 28.

Initially, the lower court dismissed the complaint against all parties, finding Molinari's letter "within the boundaries of permissible expression by public officials that the Second Circuit has recognized." 150 F.Supp.2d 508, 514. The court also held that there was no Establishment Clause violation because the letter "condemns the 'intolerance' of the message" but "expresses no hostility toward plaintiffs' religion or any other religion." *Id.*

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[4] Okwedy refused, and eventually a bomb squad was dispatched. In the end, the package was found to contain sexually explicit homosexual magazines. App. 28.

[5] Among the threats received by Rev. Okwedy was the following: "You f---ing nigger, go back to your country, I'm going to kill you, we're coming to get you." App. 42.

On the first appeal, the Second Circuit affirmed on all grounds but one, reversing and remanding on the free speech claim to allow discovery as to whether there was any coercion by the government in obtaining removal of the billboards. *See Okwedy*, 333 F.3d at 340-41. On the Establishment Clause claim, the court held that since there was no "denominational preference" or violation of the *Lemon* test,[6] the dismissal should be affirmed. *Id.*

On remand, Okwedy amended the complaint to challenge the facial constitutionality of Section 8-101, the Human Rights Law, on which the City had claimed to rely in condemning Okwedy's message and which both the lower court and the Second Circuit had cited as authority for the City's actions. *See* App. 4. After discovery, the district court granted summary judgment for both the City and PNE, and denied leave for Okwedy to amend a second time, deeming the exercise futile. App. 20.

On the second appeal, the Second Circuit affirmed. In its summary order, the court found that the City had not acted pursuant to § 8-101, despite its own prior determination that "Molinari acted pursuant to the general policy against 'intolerance' and 'bigotry' expressed in New York law and the New York City Administrative Code § 8-101." *See* 69 Fed.Appx. 482, 484. It further held that even if the City had acted pursuant to a policy when it criticized Okwedy's speech, it would not have violated the Constitution. App. 4.

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[6] The Second Circuit, however, engaged in no analysis of the three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971).

## REASONS FOR GRANTING THE PETITION

### I. THE SECOND CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BUT SHOULD BE SETTLED BY THIS COURT.

While repeatedly acknowledging that the Establishment Clause prohibits hostility toward religion, this Court has not squarely addressed the types of conduct that constitute such hostility. And, although lower federal courts carefully scrutinize claims of endorsement of religion and find in them Establishment Clause violations with hair-trigger sensitivity, the same is not true of hostility claims.

The lack of decisions holding that government acted with hostility toward religion is significant at this time because conflicts between governmental conduct and expression protective of a certain segment of society on one hand, and religious adherents seeking to express themselves and proselytize on the other, is increasing at an alarming rate. The question naturally arises, May government further its interest in preventing discrimination by condemning religious beliefs and curtailing religious expression? The question begs for an answer from this Court.

#### A. The Principle of Government Neutrality Toward Religion Is Well Established.

It has long been held that the government's attitude toward religion must be one of "wholesome neutrality." *School Dist. of Abington Tp., Pa. v. Schempp,* 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed.2d 84 (1963). "The First Amendment forbids an official purpose to disapprove of a

particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (citations omitted).

"[G]overnment must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 627, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (O'Connor, J., concurring in part and concurring in judgment) (quoting *Wallace v. Jaffree,* 472 U.S. 38, 70, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring in judgment)). "Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the 'understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens. . . . '" *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 125 S.Ct. 2722, 2733 (2005) (quoting *Zelman v. Simmons-Harris,* 536 U.S. 639, 718, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (Breyer, J., dissenting)).

### B. Although Cases Holding that the Government Has Violated the Establishment Clause by Official *Promotion* of Religion Abound, the Parameters Governing Government *Hostility Against* Religion Are Woefully Lacking.

As recently observed in the case of *Van Orden v. Perry*, "this Court's precedent permits even the slightest public recognition of religion to constitute an establishment of

religion." *Id.*, 545 U.S. 677, ___, 125 S.Ct. 2854, 2866 (2005) (Thomas, J., concurring) (citing *Granzeier v. Middleton*, 955 F.Supp. 741, 743, and n. 2, 746-747 (E.D.Ky. 1997), *aff'd on other grounds*, 173 F.3d 568, 576 (6th Cir. 1999) (sign at courthouse alerting public that building was closed for Good Friday and containing crucifix held unconstitutional); *Buono v. Norton*, 212 F.Supp.2d 1202, 1204-1205, 1215-17 (C.D.Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004) (cross erected to honor World War I veterans in the Mojave Desert Preserve violated Establishment Clause); and *Robinson v. Edmond*, 68 F.3d 1226 (10th Cir. 1995) (city seal)).

Such claims may be raised by mere passersby who are "free to ignore [such symbols or signs], or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 664, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (Kennedy, J., concurring in part and dissenting in part).

By contrast, Okwedy and others similarly situated cannot ignore the hostile actions of the government directed against them. Indeed, they are typically singled out and targeted by the government. In this very case, Okwedy sought only to communicate with his fellow citizens; he took no action toward the government. Yet he found himself at the center of a concerted effort to silence his religious speech, led by high-level City officials. *See also American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1119, 1122-23 (9th Cir.), *cert. denied*, 537 U.S. 886 (2002) (upholding resolution condemning Christian ministries' "hateful rhetoric against gays" in their "Truth in Love" campaign seeking

to proselytize homosexuals; holding that primary effect of resolution was not hostility, but "encouraging equal rights for gays and discouraging hate crimes").

This Court has unequivocally asserted on numerous occasions that just as the government may not promote religion, neither can it demonstrate hostility toward religion. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 845-46, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (denying access to private speaker on basis of religious viewpoint "risk[s] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires"); *Church of the Lukumi Babalu Aye, supra*, 508 U.S. 520, 532 ("[t]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general"); *Lee v. Weisman,* 505 U.S. 577, 589, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State"); *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . . Indeed, as we have observed, such hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.' ") (citations omitted); *id.*, 465 U.S. at 692 ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement *or disapproval* of religion.") (O'Connor, J., concurring) (emphasis added); *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by

virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.") (Brennan, J., concurring in judgment); *Committee For Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756, 788, 93 S.Ct. 2955, 2973 (1973) ("our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion").

Yet despite the consistent recognition by this Court of the impropriety of exhibiting hostility toward religion, cases squarely holding that a government action or pronouncement was unconstitutional on that basis are virtually non-existent. *See Peck v. Baldwinsville Central Sch. Dist.*, 426 F.3d 617, 635 (2d Cir. 2005) (dismissing kindergartner's hostility claim resulting from school district's censorship of environmental poster depicting Jesus Christ as "the only way to save our world" because, among other reasons, district sought to avoid appearance of endorsement of religion); *Strout v. Albanese*, 178 F.3d 57, 60-64 (1st Cir. 1999) (rejecting assertion that excluding sectarian schools from a tuition program demonstrated hostility toward religion); *but see Brown v. Polk County, Iowa*, 61 F.3d 650, 658-59 (8th Cir. 1995) (en banc) (order by county supervisor to employee to "cease any activities that could be considered to be religious proselytizing, witnessing, or counseling" held to exhibit "a hostility to religion that our Constitution simply prohibits").

The tacit message communicated to government officials by lower federal courts seems to be that while hostility is theoretically proscribed, in practice it is almost never transgressed. *See* Andrew R. Cogar, Note, *Government Hostility to Religion: How Misconstruction of the Establishment Clause Stifles Religious Freedom*, 105 W.

Va. L. Rev. 279, 307-10 (2002) (arguing that *Lemon* test is ill-suited to religious discrimination and hostility claims).

### C. The Growing Tension Between Broadly Worded Laws Against Discrimination and the Right to Proselytize and Express Religious Beliefs Should Be Addressed by this Court.

In spite of the reluctance on the part of the courts to find impermissible government hostility toward religion, there is an unmistakable and increasing tension between religious freedom and the continued expansion of non-discrimination laws. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (New Jersey Law Against Discrimination as applied to Boy Scouts impermissibly infringed right of expressive association); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (school district's anti-harassment policy prohibiting "unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of" one of the enumerated characteristics, which included "sexual orientation," declared facially unconstitutional on challenge by Christian parents and students seeking to share their faith); *American Family Ass'n, Inc., supra*, 277 F.3d 1114 (municipality's interest in prohibiting discrimination justified criticism of religious message).

The wave of new statutes granting legal protection from discrimination on the basis of sexual orientation places citizens of faith in peril.[7] Their deeply held religious

[7] *See, e.g.*, Conn. Gen. Stat. Ann. § 4a-60a (prohibiting discrimination in contracts with the government); Haw. Rev. Stat. § 368-1 et seq.; 5 Me. Rev. Stat. Ann. § 4552; Md. Code, Art. 49B, § 5; Mass. Gen. Laws

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convictions are increasingly labeled hateful, homophobic and discriminatory. The rights of well-meaning religious citizens to proselytize are minimized and infringed in the name of preventing discrimination. For example, hate crime laws have also been employed to criminalize the expression of religious beliefs. *See, e.g., Startzell v. City of Philadelphia*, 2006 WL 1479809 (E.D.Pa. 2006) (Christians attempting to proselytize peacefully at gay pride "Outfest" event in downtown Philadelphia arrested and charged with eight different crimes, including "ethnic intimidation," a felony).

As our nation continues to embrace tolerance and diversity, there is a corresponding intolerance for certain religious convictions. Few topics elicit a more heated response today than religion in the public square. Although the majority is certainly free to enshrine tolerance as the highest virtue, it must never be permitted to infringe the rights of the minority to peacefully express their views, however unpopular. The Free Exercise clause "has never meant that a majority could use the machinery of the State to practice its beliefs." *Schempp*, *supra*, 374 U.S. 203, 226.

Open and robust debate on the issues of the day has been the cornerstone of our republic. But since this Court's ruling in *Lawrence v. Texas*,[8] the spark of polarization has

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Ann. 272 § 98 (public accommodations); Nev. Rev. Stat. 233.010; Minn. Stat. Ann. § 363A.02; N.J. Stat. Ann. 10:5-3; N.M. Stat. Ann. § 28-1-7 (1978); N.Y. Civ. Rights Law § 40-c; R.I. Gen. Laws § 11-24-2 (1956); 9 Vt. Stat. Ann. § 4503 (housing); Wash. Rev. Code § 49.60.010 et seq.; D.C. Code, Art. I, Bill of Rights (2001 Ed.). Municipal codes too numerous to list provide similar protections.

[8] 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

ignited the culture war as never before. Allowing one side to silence the opposition risks the establishment of a *de facto* orthodoxy of belief on the great issues unless this Court acts. In the end, this heavy-handed methodology benefits no one: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641, 63 S.Ct. 117, 87 L.Ed. 1628 (1943).

## II. THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH THE LAW OF THIS COURT AND OF OTHER CIRCUITS.

Certiorari should also be granted here because the decision of the Second Circuit conflicts both with previous decisions of this Court and with decisions of her sister circuits. Whereas the Second Circuit found that the City's condemnation of Okwedy's religious beliefs was permissible under the government speech doctrine,[9] this holding conflicts with the opinions of this Court, which require a different standard when religion is implicated.

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[9] Characterizing the policy as "criticizing speech deemed to be intolerant," the Second Circuit stated: "When the government speaks, it is not bound by principles of viewpoint neutrality and can make persuasive arguments for its own favored point of view." 2006 WL 2374263 at *2 (citations omitted). The court held that the speech is permitted provided only that it does not "threat[en], coerc[e], or intimidat[e]." *Id.* (quoting *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 71 (2d Cir. 1999)).

### A. The Second Circuit Decision Conflicts with Decisions of This Court.

For example, Justice O'Connor wrote that when an Establishment Clause case involves "government-sponsored speech or displays," the endorsement test "captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" *County of Allegheny, supra*, 492 U.S. 573, 627 (O'Connor, J., concurring in part and concurring in judgment) (quoting *Wallace v. Jaffree, supra*, 472 U.S. 38, 70 (O'Connor, J., concurring in judgment)).

Here, of course, there can be little doubt that the City's opprobrium diminished Okwedy's standing in the political community – he was a pariah after the City's public condemnation of his beliefs. The City did not merely make Okwedy's religious beliefs *relevant* to his standing in the community; it made his religious beliefs the *exclusive* criterion for subjecting Okwedy to vicious attacks and ostracism.[10]

Justice O'Connor couched her approach in slightly different terms in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*: "Cases involving government speech on religious topics . . . seem to me to fall into a different category and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than

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[10] Indeed, when Okwedy's lawsuit was dismissed, Master characterized the defeat as "a victory for all Staten Islanders." Okwedy and Keyword were residents of Staten Island at the time.

on whether the government action is neutral with regard to religion." *Id.*, 512 U.S. 687, 720, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (O'Connor, J., concurring). Thus, where Justice O'Connor requires only that government speech on a religious topic "disapprove" of religion in order to violate the Establishment Clause, the Second Circuit requires that it threaten, coerce, or intimidate. Under Justice O'Connor's analysis, the City undoubtedly violated the Establishment Clause; under the Second Circuit's, it arguably did not.[11]

The Second Circuit's decision also conflicts with the long-held rule that Establishment Clause violations ought to be addressed at the earliest opportunity. As this Court stated in *Schempp*:

> [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' Memorial and Remonstrance Against Religious Assessments, quoted in Everson [v. Board of Ed. of Ewing Tp.], 330 U.S. 1, 65, 67 S.Ct. 504, 536, 91 L.Ed. 711 (1947).

*Schempp, supra*, 374 U.S. 203, 225.

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[11] The court also held that the City was not criticizing Okwedy's religion, but only Okwedy's discrimination against homosexuals. This is a distinction without a difference, especially where, as here, the message consisted entirely in quotes taken directly from a sacred text.

### B. The Second Circuit Decision Conflicts with Decisions from Sister Circuits.

In addition to conflicting with decisions of this Court, the Second Circuit's summary order also conflicts with decisions of other circuits. For example, in *Chandler v. James*,[12] the Eleventh Circuit wrote: "If endorsement is unconstitutional because it 'sends a message to nonadherents that they are outsiders,' disapproval [of religious speech] is unconstitutional because it 'sends the opposite message.'" *Id.* at 1261 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). Thus the Eleventh Circuit, like Justice O'Connor, requires no threat, coercion, or intimidation in order to find an Establishment Clause violation where government speech is involved.

Similarly, in upholding the Free Exercise rights of a religious supervisor, the en banc Eighth Circuit has stated that if the government were to have removed the supervisor's religious displays from his office due to their "offensiveness," "the county would be taking sides in a religious dispute, which, of course, it cannot do under either the establishment clause or the equal protection clause." *Brown v. Polk County, Iowa*, *supra*, 61 F.3d 650, 659; *see also Linnemeir v. Board of Trustees of Purdue Univ.*, 260 F.3d 757, 762 (7th Cir. 2001) ("It is axiomatic that government speech that endorses religion, or evidences hostility toward a particular religion, is constitutionally improper under the Establishment Clause.") (Coffey, J., dissenting); *id.* at 765 ("A state-sponsored disparagement of a particular belief sends the message to its believers that they and

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[12] 180 F.3d 1254 (11th Cir. 1999), *cert. granted, opin. vacated*, 530 U.S. 1256 (2000), *opin. reinstated on remand, Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001).

their firmly held convictions are disfavored members of the community."); *Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806, 825 (5th Cir. 1999) ("When the government restricts sectarian and proselytizing religious speech, while embracing ecumenical religious speech, the government has engaged in illegitimate, viewpoint discrimination.") (Jolly, J., dissenting).

Because Okwedy's billboard consisted of nothing more that a direct quote from the Bible, criticism of Okwedy's message was criticism of his religious beliefs, and a corresponding preference for religious beliefs that accept or approve of homosexuality. The Second Circuit's holding in favor of the City thus conflicts with the Fourth Circuit's affirmance in *Simpson v. Chesterfield County Bd. of Supervisors*,[13] wherein it was stated: "If the Establishment Clause means anything, it means that government is not to demonstrate any preference for one set of religious beliefs over another, or for that matter, over the lack of any religious belief." 292 F.Supp.2d at 823.

Finally, the City's repeated attempts to censor Okwedy's message, together with its sending two detectives to visit Keyword Ministries, were driven by animus against Okwedy's religious message. Plainly, Okwedy was made to feel like an "outsider." *See Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309-10, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000).

[13] 292 F.Supp.2d 805 (E.D.Va. 2003), *aff'd in part, rev'd in part*, 404 F.3d 276 (4th Cir.), *cert. denied*, 126 S.Ct. 426 (2005).

## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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2006 WL 2374263

**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

(Filed Aug. 15, 2006)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of August, two thousand and six.

PRESENT:

HON. CHESTER J. STRAUB,
HON. ROSEMARY S. POOLER,
HON. ROBERT D. SACK,

*Circuit Judges.*

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KRISTOPHER OKWEDY and
KEYWORD MINISTRIES, INC.,

*Plaintiffs-Appellants,*

**SUMMARY ORDER**
No. 05-6217

v.

CITY OF NEW YORK,

*Defendant-Appellee,*

---

Appearing for the Appellants: Stephen M. Crampton (Brian Fahling and Michael J. DePrimo, on the brief), AFA Center for Law & Policy, Tupelo, MS.

Appearing for the Appellee: Alan G. Krams (for Michael A. Cardozo, Corporation Counsel of the City of New York; Kristin M. Helmers, of counsel), New York, NY.

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Appeal from the United States District Court for the Eastern District of New York (Nina Gershon, *Judge*).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

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Plaintiffs-Appellants, Kristopher Okwedy and Keyword Ministries, Inc., appeal from an order of the District Court, entered October 12, 2005, which granted defendant-appellee City of New York's motion for summary judgment and denied plaintiffs' motion for leave to amend the complaint. This case was before the District Court following a June 25, 2003, remand order by this Court. We assume that the parties are familiar with the facts, the procedural history, our earlier decision, and the scope of the issues presented on appeal. *See Okwedy v. Molinari,* 333 F.3d 339 (2d Cir. 2003); 69 Fed. Appx. 482 (2d Cir. 2003).

We conclude that the District Court properly granted summary judgment on the facial and as-applied constitutionality of Section 8-101 of New York City's Administrative Code, known as the Human Rights Law ("Section 8-101"). *See* N.Y.C. Admin. Code § 8-101. Section 8-101 states an official policy against "prejudice, intolerance,

[and] bigotry" and establishes an agency to combat discrimination in housing, employment, and public accommodations, as well as "to take other actions against prejudice, intolerance, bigotry, discrimination and bias-related violence or harassment." *See id.* Section 8-101 does not itself prohibit or regulate speech.

Indeed, plaintiffs do not argue that the text of the statute is unconstitutional but rather that officials have construed it in a way that makes it so. Although plaintiffs are correct that we must look beyond the text to "authoritative constructions" of the law, *see Forsyth Cty., GA v. Nationalist Mvmt.*, 505 U.S. 123, 131 (1992), plaintiffs fail to cite any construction that supports their theory that the City interprets the Human Rights Law to suppress speech that conflicts with its anti-discrimination policy. Plaintiffs claim that statements made by defense counsel during the course of trial are authoritative constructions of the law on par with the text of the statute. But these statements are legal theories rather than facts, and as such cannot constitute binding judicial admissions attributable to the City. *See New Amsterdam Cas. Co. v. Waller,* 323 F.2d 20, 24 (4th Cir. 1963) ("The doctrine of judicial admissions has never been applied to counsel's statement of his conception of the legal theory of the case.").

We further conclude that the District Court properly entered summary judgment for defendant on the as-applied constitutionality of Section 8-101. In order to prevail on an as-applied challenge, plaintiffs must show that they were injured "as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298 (1979). Plaintiffs have offered no

evidence that any City official saw himself as enforcing Section 8-101 in responding to plaintiffs' billboards.*

Even if we were to conclude that city officials acted pursuant to a policy or custom – whether contained in Section 8-101 or elsewhere – of criticizing speech deemed to be intolerant, such a policy or custom would not violate the First Amendment, as applied to the states through the Fourteenth Amendment. When the government speaks, it is not bound by principles of viewpoint neutrality and can make persuasive arguments for its own favored point of view. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1014 (9th Cir. 2000); *Connell v. Signoracci*, 153 F.3d 74, 82 (2d Cir. 1998) ("The Mayor is privileged, for example, to organize a rally against pornography, to call the topless bars a 'black eye on the community' and a 'slimy business,' and to call for a boycott of the establishments."). Such speech is permissible as long as the government does not "threat[en], coerc[e], or intimidat[e]." *See X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 71 (2d Cir. 1999). Government speech criticizing Okwedy and his message,

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* In our earlier summary order, we noted that "plaintiffs acknowledge that [Borough President] Molinari acted pursuant to the general policy against 'intolerance' and 'bigotry' expressed in New York law and the *New York City Administrative Code § 8-101.*" *Okwedy*, 69 Fed. Appx. at 5. Insofar as that language may have suggested that we read Section 8-101 to authorize or require the City's response to the billboards, we take this opportunity to clarify that such is not the case. Rather, our earlier order was meant to explain that plaintiffs had produced no evidence that Molinari's intent, in criticizing their billboards, was to suppress religious expression, and that, to the contrary, Molinari's actions were supported by the city's "*general* policy" against discrimination, of which Section 8-101 is one expression. *Id.* at 1 (emphasis added).

alone, does not constitute "viewpoint discrimination" or violate the First Amendment.

Finally, we conclude that the District Court properly denied plaintiffs' motion for leave to amend the complaint as futile. The District Court previously dismissed many of plaintiffs' First Amendment claims, and this Court affirmed. Plaintiffs now seek to revive these claims on the basis of modified facts. The new allegations include (1) statements concerning the City's interpretation of Section 8-101, and (2) the visit by New York City's Bias Crimes Task Force to Keyword Ministries. Plaintiffs' first new allegation, that the City called plaintiffs' billboards displaying Bible verses "bigoted," is the functional equivalent of the statement we deemed inactionable in our prior summary order: that the message espoused by the billboards was "intolerant." *See Okwedy,* 69 Fed. Appx. at 3. Because neither statement "create[s] a denominational preference or violate[s] the *Lemon* test," allowing plaintiffs to amend their complaint to reassert an Establishment Clause claim would be futile. *Id.* at 6 (citing *Lemon v. Kurtzman,* 403 U.S. 602 (1971)).

Plaintiffs also seek to amend their complaint to allege that in visiting Keyword Ministries, the police were implementing the City's policy underlying Section 8-101 and trying to suppress plaintiffs' speech. However, "a municipality can be held liable [under Section 1983] only if the alleged unconstitutional action implements an official policy or custom [of the municipality], whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Morris v. Lindau,* 196 F.3d 102, 111 (2d Cir. 1999) (internal quotation marks omitted). "A single incident alleged in a complaint, especially if it involved only actors below the

policymaking level, generally will not suffice to raise an inference of the existence of a custom or policy." *Dwares v. New York,* 985 F.2d 94, 100 (2d Cir. 1993). Plaintiffs' new allegations, even if proven, would not indicate any official policing policy sufficient to support a claim under Section 1983. As a result, we conclude that the District Court did not exceed its allowable discretion in denying leave to amend the complaint.

For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
ROSEANNE B. MACKECHNIE, CLERK

/s/ Lucille Carr
BY:

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

----------x

**KRISTOPHER OKWEDY and KEYWORD MINISTRIES, INC.,**

**Plaintiffs,**

**v.**

**GUY V. MOLINARI, CITY OF NEW YORK, and PNE MEDIA, LLC,**

**Defendants.**

----------x

**OPINION & ORDER**

**00 CV 5426 (NG) (CLP)**

(Filed Oct. 12, 2005)

**GERSHON, United States District Judge:**

Plaintiffs' Amended Complaint brings claims under 42 U.S.C. § 1983, alleging that the defendants' conduct deprived them of their rights under the First and Fourteenth Amendments to the United States Constitution and also violated the laws of the State of New York. I dismissed plaintiffs' original Complaint in its entirety in a July 18, 2001 Opinion. *See Okwedy v. Molinari*, 150 F.Supp.2d 508 (E.D.N.Y. 2001), *vacated in part by* 333 F.3d 339 (2d Cir. 2003), *and aff'd in part*, 69 Fed.Appx. 482 (2d Cir. 2003). The Court of appeals vacated the dismissal of plaintiff's First Amendment Free Speech claim and affirmed the dismissal of all other claims asserted in the original complaint. *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003); *Okwedy v. Molinari*, 69 Fed.Appx. 482 (2d Cir. 2003). Familiarity with all prior decisions is presumed. After remand, in an Amended Complaint, plaintiffs assert new claims and reassert the dismissed claims, identified as the First and Second "Causes of Action" in the July 18, 2001 Opinion, in order to preserve "the issues for further

appeal after final judgment." Amended Complaint at 8-9. At a September 9, 2004 Pre-Motion Conference before me, plaintiffs voluntarily dismissed the Third, Fifth, Seventh and Ninth Causes of Action in the Amended Complaint and dismissed Guy V. Molinari as a defendant. Thus, the remaining claims in the Amended Complaint are: (1) plaintiffs' First Amendment claim that New York City Administrative Code ("NYC Admin. Code") § 8-101 is unconstitutional[1] (the "Fourth Cause of Action" – against defendant City of New York ("the City")); (2) plaintiffs' claim that PNE's actions violated New York Executive Law § 296-5(b) (the "Sixth Cause of Action" – against Defendant PNE Media LLC ("PNE")), and plaintiffs' claim that PNE's actions constituted Breach of Contact (the "Eighth Cause of Action" – against PNE). The City and PNE move for summary judgment or dismissal on all remaining claims against them, pursuant to Fed. R. Civ. Proc. 56. Plaintiffs oppose summary judgment and have moved to amend the Amended Complaint. For the reasons set forth below, defendants' motions are granted and plaintiffs' motion is denied.

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[1] This claim is distinct from the First Amendment claim that was raised in plaintiffs' original complaint, which was based entirely on Guy Molinari's communications to PNE and the removal of plaintiffs' billboards. The Second Circuit reversed the dismissal of that claim and remanded, but plaintiffs have now voluntarily dismissed that claim because discovery revealed that removal of the billboards began before Molinari communicated with PNE and therefore there is no evidence supporting the original First Amendment claim.

*Background*

Unless otherwise indicated, the following facts are undisputed:

Plaintiff Kristopher Okwedy, an ordained minister, is the pastor of Keyword Ministries, "a Christian church dedicated to promoting traditional biblical values, which includes teaching that homosexual behavior is a sin before God." On or about March of 2000, plaintiffs posted billboards in two locations in the borough of Staten Island, New York, which each stated "Thou shall not lie with mankind as with womankind. It is an abomination," and equivalent messages. The messages cited the biblical verse "Leviticus 18:22" as their origin. The billboards being used by plaintiffs were owned and operated by PNE. On the morning of March 8, 2000, at some point between 7:30a.m. and 8:30a.m., PNE arranged for the signs to be removed and ultimately covered them with different messages. Later in the day, at approximately 12:00p.m., Guy V. Molinari, then Borough President of Staten Island, sent a letter, via facsimile, to PNE, which stated:

> For the last two days we have attempted to contact your office, without success, at your listed telephone number (908) 810-1176.
>
> I write regarding the recent appearance on two of your Staten Island billboards of four translations of Leviticus 18:22. As you are probably aware this particular biblical verse is commonly invoked as a biblical prohibition against homosexuality.
>
> The sponsor for the billboard message is nowhere apparent on the billboard, so I am writing to you with the hope that I can establish a dialogue

> with both yourself and the sponsor as quickly as possible.
>
> Both you and the sponsor of this message should be aware that many members of the Staten Island community; myself included, find this message unnecessarily confrontational and offensive. As Borough President of Staten Island I want to inform you that this message conveys an atmosphere of intolerance which is not welcome in our Borough.
>
> P.N.E. Media owns a number of billboards on Staten Island and derives substantial economic benefit from them. I call on you as a responsible member of the business community to please contact Daniel L. Master, my legal counsel and Chair of my Anti-Bias Task Force at (718) 816-2056 to discuss further the issues I have raised in this letter.

Also on March 8, 2000, PNE issued a press release announcing that the billboards had been removed.

The publicity surrounding the events described above caused Detective Kevin Czatoryski, of the New York City Police Department ("NYPD") Hate Crimes Task Force, to visit Keyword Ministries at some point in the spring of 2000. Detective Czatorski [sic] spoke with plaintiffs and left his card, but the exact date, the nature, and the purpose of the detective's visit are in dispute. This visit and other facts relied upon by plaintiffs are addressed *infra*.

*Discussion*

## I. Summary Judgment Standard

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The standard for granting summary judgment mirrors the standard for a directed verdict under Rule 50(a), which permits the court to grant a motion for judgment as a matter of law when "there is no legally sufficient evidentiary basis for a reasonable jury" to decide an essential issue in favor of the non-moving party. Fed.R.Civ.P. 50(a)(1); *see id.* at 323. The burden is on the moving party to demonstrate that there are no material facts genuinely in dispute. See *Weinstock v. Columbia Univ.,* 224 F.3d 33, 41 (2d Cir.2000). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). To prevail, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *id.* at 587. A motion for summary judgment cannot therefore be defeated by "mere speculation or conjecture." *Giordano v. City of New York,* 274 F.3d 740, 749-50 (2d Cir.2001). In deciding a

motion for summary judgment, the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Howley v. Town of Stratford,* 217 F.3d 141, 150-151 (2d Cir.2000).

## II. Constitutionality of New York City Administrative Code § 8-101

Plaintiffs contend that NYC Admin. Code § 8-101 is both facially unconstitutional and unconstitutional as applied to plaintiffs. Specifically, plaintiffs assert that Section 8-101 "imposes an affirmative duty on New York City Government officials to act to eliminate all forms of perceived intolerance toward homosexuality, including peaceful speech," and that Section 8-101 "unconstitutionally prescribes what shall be orthodox in politics . . . religion, or other matters of opinion." Amended Complaint ¶¶ 63, 65 (internal quotation marks omitted).

Section 8-101 is a policy statement and a mandate for the creation of an agency. Other portions of the New York City Human Rights Law proscribe discrimination in public accommodations. The text of Section 8-101 reads as follows:

> In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, age, national origin, alienage or citizenship status, gender, sexual orientation, disability,

> marital status, status as a victim of domestic violence or status as a victim of sex offenses or stalking, whether children are, may be or would be residing with a person or conviction or arrest record. The council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination, bias-related violence or harassment and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. A city agency is hereby created with power to eliminate and prevent discrimination from playing any role in actions relating to employment, public accommodations, and housing and other real estate, and to take other actions against prejudice, intolerance, bigotry, discrimination and bias-related violence or harassment as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

### A. Facial Challenge

Plaintiffs' facial challenge to NYC Admin. Code § 8-101 cannot survive the motion for summary judgment. In order to prevail on a facial attack of Section 8-101, plaintiffs "must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to plaintiff[s]; and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.'" *New York State Club Association v. City of New York,* 487 U.S. 1, 11 (1988). "Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" *Hobbs v. County of Westchester,* 397 F.3d 133, 155

(2d Cir. 2005) (quoting *FCC v. Pacifica Foundation,* 438 U.S. 726, 743 (1978)). Plaintiffs have failed to demonstrate that Section 8-101 is facially unconstitutional under either prong of the standard articulated in *New York State Club Association.* Section 8-101's language, opposing "prejudice, intolerance, bigotry, and discrimination, bias-related violence or harassment and disorder occasioned thereby," expresses the desire of the City to foster an atmosphere of tolerance. The statute does not impose civil or criminal penalties for expression of any viewpoint. Nor does it direct city employees to discriminate against any viewpoint. Rather, it creates a city agency whose purpose is to eliminate discrimination in employment and public accommodations, goals that the City is undoubtedly authorized to pursue under the Constitution. Indeed, the United States Supreme Court rejected a facial challenge to the New York City Human Rights Law almost twenty years ago. *See New York State Club Association,* 487 U.S. at 11-14 (holding that "[t]he facial attack based on the claim that Local Law 63 is invalid in all of its applications must therefore fail" and that the Court could not "conclude that the Law is substantially overbroad and must assume that whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."). Thus, plaintiffs' attack on the New York City Human Rights Law may succeed only if they can demonstrate that it is unconstitutional as applied to them.

### B. As-Applied Challenge

Plaintiffs' as-applied challenge rests on six alleged "facts." First, plaintiffs cite Molinari's November 8, 2000 letter to PNE, quoted above. Plaintiff's Br. at 13. Second,

plaintiffs cite Molinari's failure to initiate discussions with plaintiffs following the covering of plaintiffs' billboard messages. *Id.* at 14. Third, plaintiffs cite the City's response to Plaintiffs' Interrogatory No. 12, "in which the City characterized the Bible verses contained on Plaintiffs' billboards as 'convey[ing] bigoted views of homosexuals.'" *Id.* at 15. Fourth, plaintiffs cite defendants' July 25, 2001 press release which describes the initial dismissal of plaintiffs' suit as a "victory for all Staten Islanders." *Id.* at 16. Fifth, plaintiffs cite the fact that the City kept a number of newspaper articles written about the instant dispute where the word "discrimination" appears in an unknown hand on each of the clippings. *Id.* Sixth, plaintiffs cite "the special trip made by two police officers from the Bias Crimes Unite [sic] to Keyword church, ostensibly to speak with Rev. Okewdy [sic] but in reality a clumsy attempt to intimidate Plaintiffs from posting any more messages deemed offensive by the City." *Id.* at 17.

In order to challenge the constitutionality of Section 8-101 as it is applied to them, plaintiffs "must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *See Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298 (1979). However, "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Id.* (quoting *Younger v. Harris,* 401 U.S. 37, 42 (1971)). Considering all of the evidence in the light most favorable to plaintiffs, plaintiffs identify only two actions that could be construed as manifestations of the policy expressed in Section 8-101: (1) Detective Czatoryski's visit with his partner to Keyword Ministries and (2) Borough President Molinari's communication to PNE regarding plaintiffs' billboards.

Plaintiffs' other "facts," described above, presumably are introduced in order to evidence defendants' state of mind with regard to these actions.

However, plaintiffs have failed to produce any evidence supporting their assertion that the state actions in question were taken pursuant to Section 8-101. To begin with, as described above, Section 8-101 neither requires particular conduct or views by citizens, nor imposes any civil or criminal penalties on conduct or views. It is merely a policy statement justifying the creation of an agency empowered to deal with discrimination.[2] Molinari testified at his deposition that he contacted PNE because of public safety concerns stemming from his prior experience with anti-homosexual violence. *See* City's Motion for Summary Judgement Exhibit G, Deposition of Guy Molinari at 9 (hereinafter "Molinari Dep."). He further testified that he was not generally familiar with Section 8-101 at the time of his deposition and that he had not even known of its existence during his tenure as Staten Island Borough President. *See* Molinari Dep. at 20. Detective Czatoryski testified that he was unfamiliar with Section 8-101 and that he did not know what the Public Accommodations Law was. *See* City's Motion for Summary Judgement Exhibit J, Deposition of Kevin Czatoryski at 11 (hereinafter "Czatorski Dep."). He further testified that his visit to Keyword Ministries was not related to Section 8-101. *See* Czatoryski Dep. at 11.

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[2] The "city agency" created by the New York City Human Rights Law is the New York City Human Rights Commission. *See* Website of the City of New York, available at http://www.nvc.gov/html/cchr/home.html (last visited – Oct. 11, 2005).

Thus, plaintiffs do not present the typical situation of an as-applied challenge where an individual is prosecuted or threatened with prosecution under a statute allegedly in violation of the Constitution. *See, e.g., United States v. Rybicki,* 354 F.3d 124, 127 (2d Cir. 2003) (rejecting appellants' as-applied challenge to wire fraud statute under which they were convicted), *cert. denied,* ___ U.S. ___, 125 S.Ct. 32 (2004). Rather, plaintiffs have identified state action directed at them and have asserted, without any proof, that this state action was carried out under the auspices of Section 8-101. Plaintiffs cannot defeat summary judgment with "mere speculation" that Borough President Molinari and Detective Czatoryski were attempting to enforce Section 8-101, especially when Section 8-101 has no enforcement mechanism.[3] *See Giordano,* 274 F.3d at 749-50. Plaintiffs have not alleged or offered evidence of any role by the city agency whose creation was mandated by Section 8-101. Nor have plaintiffs produced any testimony or records that support a connection between defendants' actions and Section 8-101. Thus, plaintiffs have failed to demonstrate that there is a material fact in dispute with regard to plaintiffs' remaining claim, and defendants' motion for summary judgment must be granted.

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[3] Ultimately, plaintiffs appear to be inappropriately conflating their challenge to Section 8-101 with their Section 1983 Establishment Clause claims, which were dismissed in my July 18, 2001 Opinion. *Okwedy*, 150 F.Supp.2d at 519-521, *affd.* in relevant part, 69 Fed.Appx. 482 (2003).

## III. Motion to Amend

Plaintiffs' motion for leave to amend the Amended Complaint seeks: (1) to reassert plaintiffs' Establishment Clause claim, with modified facts; (2) to reassert plaintiffs' "Free Speech/Free Exercise/Establishment Clause Hybrid" claim, with modified facts; and (3) to add new facts and a new party, Frank J. Nataro, to plaintiffs' state law claims against PNE. At this stage of litigation, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. Proc. 15(a). Nonetheless, "the district court has the discretion to deny leave if there is a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party." *Jin v. Metropolitan Life Insurance,* 310 F.3d 84, 101 (2d Cir. 2002). An amendment is futile "if the proposed new claim cannot withstand a 12(b)(6) motion to dismiss for failure to state a claim." *Milanese v. Rust-Oleum Corp.,* 244 F.3d 104 (2d Cir. 2001).

Here, plaintiffs' first and second proposed amendments, the Establishment Clause claim and the Free Speech/Free Exercise/Establishment Clause Hybrid amendment, have already been dismissed, and the dismissals were affirmed by the Court of Appeals. The only difference between the old claims and the new is that plaintiffs have replaced their allegations about Molinari's communications to PNE with allegations about the acts of City officials publicly condemning the plaintiffs' billboards and labeling plaintiffs' perspective "bigoted" in the course of litigation, as well as allegations about the police visit to Keyword Ministries. These claims could not survive a Rule 12(b)(6) motion to dismiss since they suffer from the same deficiencies as plaintiffs' original allegations. *See Okwedy,*

69 Fed.Appx. at 484 ("Although Molinari's letter indicated he was aware of the biblical source of the quotations on the billboards, the letter did not 'differentiate among sects,' nor did it make 'explicit and deliberate distinctions between different religious organizations.'") (quoting *Hernandez v. Comm'r,* 490 U.S. 680, 695 (1989)) (internal citation omitted). The statements by city officials that plaintiffs wish to use as a basis for the Second Amended Complaint do not even rise to the level of Molinari's broad statement in his letter, denouncing plaintiffs' biblically based message as "intolerant." With regard to the visit by a member of the NYPD hate crimes unit to Keyword Ministries, plaintiffs have alleged only that the officer visited the church, asked questions in a gruff manner, and left a card. Plaintiffs do not identify specific statements or actions on the part of the officer evincing any intent to harass, but only their subjective feelings about the visit to Keyword Ministries. Accepting plaintiffs' allegations about the nature of the visit, as I must, plaintiffs fail to state a claim under Section 1983 where they allege only that the officers conducted an entirely legal "investigation." Therefore it is clear that the proposed amendments are futile and leave to amend is denied. Because I decline to exercise supplemental jurisdiction, as described below, I deny leave to amend with regard to plaintiffs' state law claims.

## IV. State Law Claims Against PNE

As all of plaintiffs' federal claims have been dismissed, the court declines to exercise supplemental jurisdiction over the remaining state law claims against PNE, see 28 U.S.C. § 1367(c)(3), and the claims are dismissed without prejudice.

*Conclusion*

The City's motion for summary judgment is granted. PNE's motion to dismiss is granted. Plaintiffs' motion for leave to amend their complaint is denied.

**SO ORDERED.**

_____/s/_____
**NINA GERSHON**
**United States District Judge**

**Dated: Brooklyn, New York**
**October 12, 2005**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

OKWEDY, et al.,

Plaintiffs,

v.

MOLINARI, et al.,

Defendants.

X

CV 00-5426

United States Courthouse
Brooklyn, New York

April 9, 2001
2:30 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE NINA GERSHON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MICHAEL DePRIMO, ESQ.

For Defendant NYC: NEW YORK CITY LAW DEPARTMENT
Office of Corporation Counsel
BY: DANA BIBERMAN, ESQ.

For Defendant PNE: DONALD ROSENTHAL, ESQ.

Court Reporter: Burton H. Sulzer
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 260-4526
Fax (718) 260-4504

* * *

[2] (Open Court).

THE COURT: All right, counsel. Does the city want to start?

MS. BIBERMAN: Yes, your Honor. I think your Honor has heard much of this before and it was fully briefed in our papers, but I'll just reiterate at this time that it's the Borough President's position, the city's position that the plaintiffs have set forth no viable claim under the First Amendment, either a violation of the freedom of speech, a violation of the free exercise clause, or a violation of the establishment clause. There has been no unlawful state action here and no violation of plaintiffs' rights.

Plaintiffs' billboard, through using Biblical quotes, expressed open hostility toward and intolerance of homosexuality. Plaintiffs don't deny that their quotes expressed intolerance towards homosexuality, although they may call it something different.

Not only does this violate New York City Administrative Code, Section 8-101, which prohibits such expressions of bigotry or intolerance –

THE COURT: I didn't understand you to be taking that position in your briefs, so perhaps I better –

MS. BIBERMAN: I think I mentioned in the brief that the Administrative Code –

THE COURT: The Administrative Code sections, do [3] they do anything beyond assuring no violation of employment rights and so on?

Are you saying that the Administrative Code would bar expressions of speech?

MS. BIBERMAN: No. I'm saying that the policy of the Administrative Code, the human rights law, says that there is danger to the health, safety and welfare of New York City inhabitants by expressions of antagonism

toward people based upon perceived differences, and included among those perceived differences is sexual orientation.

What the Borough President was responding to were statements that –

THE COURT: There is no ban on speech in the Administrative Code?

MS. BIBERMAN: No. What the Borough President was responding to were the expressions of intolerance which were included in the statements in the plaintiffs' billboards. These billboards called homosexuality an abomination, loathsome, detestable, forbidden and an enormous sin.

Whether these were quotes from the Bible or not, they were nonetheless statements which the Borough President said in his letter to PNE were unnecessarily confrontational and offensive, didn't belong in the Staten Island community, and in his letter to PNE media, requested a dialogue with the billboard's sponsor, recognizing in his letter to PNE Media, [4] who put the billboard up, that the sponsor of the billboard was not identified and consequently he was contacting PNE Media in an effort to –

THE COURT: May I ask you about your position? In your papers, at some point you say that this is an expression of Mr. Molinari's personal opinion.

You're not claiming that he wasn't acting as a government official, are you?

MS. BIBERMAN: He expressed his personal opinion, but he was acting as Borough President, and as Borough President he was expressing the sentiments of his

constituency in terms of what had been the public response and public outcry when these billboards appeared.

This sentiment was brought to his attention and he was responding, I believe, both in terms of his personal view, although I'd have to read into his mind for that, but he was certainly responding as Borough President, expressing the concerns of his constituents, which is his obligation and responsibility to so do.

It is significant here, and I think in the cases that we cite in our papers it's significant as well, that the Borough President in fact has absolutely no power to revoke or to issue permits for billboards or signs. That is a power that lies only in the commissioner of the Department of Buildings.

* * *

New York City Administrative Code

Chapter 1. Commission on Human Rights

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**§ 8-101 Policy.** In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, age, national origin, alienage or citizenship status, gender, sexual orientation, disability, marital status, whether children are, may be or would be residing with a person or [sic] conviction or arrest record. The council hereby finds and declares that prejudice, intolerance, bigotry and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. A city agency is hereby created with power to eliminate and prevent discrimination from playing any role in actions relating to employment, public accommodations and housing and other real estate, and to take other actions against prejudice, intolerance, bigotry and discrimination as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

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**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK BROOKLYN DIVISION**

| | |
|---|---|
| **KRISTOPHER OKWEDY** and **KEYWORD MINISTRIES, INC.,** Plaintiffs, **v.** **CITY OF NEW YORK, NEW YORK, PNE MEDIA, LLC,** and **FRANK J. NATARO,** Defendants. | **Case No. 00 CV 005426 (NG) (CLP)** |

## DECLARATION OF BRIDGET OKWEDY

I, Bridget Okwedy, declare under oath as follows:

1. I am married to Pastor Kristopher Okwedy, Pastor of Keyword Ministries, a Christian church.

2. I work at the church, assisting my husband and working in various capacities for the ministry.

3. On a Saturday in March, 2000, shortly after all the media and controversy about the billboards Keyword and Pastor Okwedy had posted containing a scripture verse, I was present at the church with my brother, Kenneth Jones, when two men arrived. They asked for Pastor Okwedy. I told them he was not there.

4. The men were quite large, well over six feet tall, and dressed all in black. I felt intimidated by them, and worried they were going to arrest Pastor Okwedy.

5. The men told us they were from the New York Police Department Bias Crimes Unit. Their manner was short and rather gruff.

6. I asked them what bias they were investigating, and they told me some homosexual men clamed [sic] they had been beaten up because of their homosexuality.

7. I asked them why they thought Keyword and Pastor Okwedy might be involved. They admitted they had no evidence connecting Pastor Okwedy, Keyword, or anyone from our congregation to the crimes other than the billboard Pastor Okwedy and Keyword had posted containing biblical verses about homosexuality.

8. The men asked us about the billboard and Pastor Okewedy's beliefs, and whether they could have been misinterpreted by some seeing the billboard or hearing one of Pastor Okwedy's sermons, presumably leading them to go out and beat up homosexuals.

9. One of the men also asked whether Pastor Okwedy preaches to make people angry.

10. I assured the men that Pastor Okwedy does not preach to make people angry. I also told them there was no way Pastor Okwedy or the billboard could have been misunderstood, and that he did not advocate violence against anyone.

11. They also asked why Pastor Okwedy had put this particular verse on the billboard. I explained that Keyword and Pastor Okwedy intended to post a series of billboards containing messages on several different themes, using scriptural verses for each. So it was not his words, but God's words.

12. One of the men told us he did not like the Old Testament. I told him we planned to include passages from the New Testament as well.

13. The man made a derogatory comment to the effect that if we put up a billboard about adultery or sex outside of marriage, most of the city would be guilty of sin.

14. Their actions and comments led me to believe they wanted to discourage Pastor Okwedy and Keyword from putting up any more billboards in the future.

15. After only a few minutes, one of the men asked to use the bathroom. I escorted him to the restroom, concerned from his demeanor that he might wander around the building looking for something to link us to a crime. Later, the other man also asked to use the bathroom.

16. Although we had called the police and reported several death threats and harassing telephone calls and e-mails, these men made no mention of the attacks against us.

17. Because of the attitude of these men, and their apparent dislike of us and our message, we did not feel it would be of any use to ask them about the threats made against us.

18. In fact, when we called the police on another occasion to report what we thought was a bomb contained in a package delivered outside our door, the police told us not to worry about it and even to just open it. We did not take their advice, and left the package where it was. Shortly thereafter, a bomb squad arrived and removed the package, which turned out to have graphic homosexual magazines in it.

19. In fact, despite our diligently reporting the numerous death threats made against us, and forwarding to the police copies of the many hateful e-mails we had received, no one from the police department ever came to interview us about them.

20. When the men were ready to leave, one of them gave us his card and asked us to be sure to have Pastor Okwedy call him. The name on the card was Detective Kevin Czartoryski.

I declare under penalty of perjury that the foregoing statements are true and correct

/s/ Bridget Okwedy
Bridget Okwedy

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK BROOKLYN DIVISION**

| | |
|---|---|
| **KRISTOPHER OKWEDY and KEYWORD MINISTRIES, INC.,** | **Case No. 00 CV 005426 (NG) (CLP)** |
| Plaintiffs, | |
| **v.** | |
| **CITY OF NEW YORK, NEW YORK, PNE MEDIA, LLC, and FRANK J. NATARO,** | |
| Defendants. | |

## DECLARATION OF REV. KRISTOPHER OKWEDY

I, Kristopher Okwedy, declare under oath as follows:

1. I am the Pastor of Keyword Ministries, a Christian church, and one of the Plaintiffs in this action. At all times material, I was a resident of Staten Island.

2. In early March of 2000, I entered into two contracts with PNE Media for the display of two billboards on Staten Island containing four translations of the biblical verse, Leviticus 18:22.

3. This message contained what I believe to be the Word of God. It is also a message that reflected my own sincerely held religious beliefs and religious creed.

4. I was not present at the church in March of 2000 when two men claiming to be from the New York Police

Department's Bias Crimes Unit came, but was informed shortly thereafter by my wife, Bridget Okwedy.

5. Bridget gave me the card of one of the men, Kevin Czartoryski, and said he had asked me to call him.

6. I therefore placed several calls to Mr. Czartoryski at the number on the card. He was not available, so I left messages.

7. Mr. Czartoryski never called me back. So I called yet again, and finally was able to reach him.

8. He sounded surprised that I called, and he had no questions for me. He said his visit to the church was "routine," and that he did not need to speak to me any longer.

9. Our conversation then ended, after a very short time.

10. I never heard from Mr. Czartoryski or any other police officer again, nor was I ever contacted by Mr. Molinari or anyone else and invited to discuss the billboards or their message. I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ [Illegible]
Kristopher Okwedy

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK BROOKLYN DIVISION**

| | |
|---|---|
| **KRISTOPHER OKWEDY** and **KEYWORD MINISTRIES, INC.,** Plaintiffs, v. **CITY OF NEW YORK, NEW YORK, PNE MEDIA, LLC,** and **FRANK J. NATARO,** Defendants. | **Case No. 00 CV 005426 (NG) (CLP)** |

## DECLARATION OF KENNETH JONES

I, Kenneth Jones, declare under oath as follows:

1. I am the brother-in-law of Kristopher Okwedy, Pastor of Keyword Ministries, a Christian church.

2. On one day in March, 2000, shortly after the media has reported Pastor Okwedy's name and address in the context of the billboard controversy, I was present at the Keyword church with my sister, Bridget Okwedy, when two men arrived. They asked for Pastor Okwedy. Bridget told them he was not there.

4. The men were big, dressed in black, and seemed biased against us, as if we had committed a crime simply for expressing our views. In fact, I wondered whether they might be homosexual themselves by the way they acted and their hostile attitude toward us.

5. The men told us they were from the New York Police Department Bias Crimes Unit.

6. They said they were there because some homosexual men had been beaten up because of their homosexuality.

7. When Bridget asked why they thought Keyword and Pastor Okwedy might be involved, they said they did not have any evidence connecting Pastor Okwedy to the crimes other than the billboard.

8. The men asked us about Pastor Okwedy, the billboard, and why it had been posted at all. They also asked whether the billboard or one of Pastor Okwedy's sermons could have been misinterpreted, and lead someone to beat up homosexuals.

9. We assured them that Pastor Okwedy meant no harm. They seemed intent on making us out to be "gay bashers," making insulting comments about Pastor Okwedy being from Nigeria and the like, but we were not hateful toward homosexuals at all.

10. They asked specifically why Pastor Okwedy had put this particular verse, Leviticus 18:22, on the billboard. We told them that the words were not Pastor Okwedy's, but God's, and that it was not personal.

11. We also told them that Keyword and Pastor Okwedy planned to post a series of billboards containing messages on several different themes, using scriptural verses for each.

12. One of the men told us he did not like the Old Testament. I told him there were passages similar to Leviticus 18:22 in the New Testament as well, such as Romans chapter 1.

13. When one of the men asked to use the bathroom, Bridget walked him to the restroom.

14. Shortly thereafter, the other man asked to use the restroom, too. I told him where it was, but did not walk with him to the door.

15. When the men got ready to leave, one of them gave us his card and asked us to be sure to have Pastor Okwedy call him. The name on the card was Detective Kevin Czartoryski.

I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Kenneth Jones
Kenneth Jones

New York Times, March 9, 2000

## Bible Verses on Homosexuality Are Covered Up on Billboards

By JULIAN E. BARNES

Two Billboards on Staten Island that angered civic and gay leaders by using a Biblical verse to condemn homosexuality were covered up yesterday, just as the identity of the man responsible for the messages was revealed.

The man, the Rev. Kristopher Okwedy of Keyword Ministries in Staten Island, said he had paid $1,800 to post the two signs for one month. The signs, in the St. George and Port Richmond neighborhoods, cited four translations of Leviticus 18:22. One read, "Thou shall not lie with mankind as with womankind: it is abomination."

The messages disappeared a day after they were denounced by the Staten Island borough president, Guy V. Molinari, and local gay leaders. Yesterday, the signs were covered with images of McGruff the Crime Dog and Smokey Bear.

Mr. Okwedy had remained anonymous until yesterday, when the billboard company, with his permission, released his name. He said he believed that the company had improperly censored him.

"This is the land of the free, home of the brave," he said. "You are supposed to protect the rights of free speech. I paid money and did not violate any city laws."

Donald Rosenthal, a lawyer for PNE Media of Union, N.J., which owns the billboards, said the signs were

removed because the advertisements did not disclose who paid for the message.

But Mr. Okwedy said that the billboards were designed by the company and that officials never told him he had to put his name on them. Originally, he said, he chose to remain anonymous because God had inspired him to post the message. But, he added, he would have put his name on the sign if asked.

Daniel L. Master, the legal counsel for Mr. Molinari, said the company should not have printed the message even if Mr. Okwedy's name had been attached.

"A responsible member of the business community would not have printed this," he said.

Mr. Rosenthal said that PNE Media respected advertisers' free speech rights, but that the company's practice was to review the editorial content of the billboards.

Advance, March 10, 2000

**Anti-gay signs down, preacher's defenses up**

MICHAEL J. PAQUETTE

The Rev. Kristopher Okwedy denies his billboard message was reflection of strong feelings against homosexuality in his homeland of Nigeria.

Taboo.

It's a rarely used word that still packs a dark stigmatic punch, long after having been chucked from the popular lexicon by free-living 20th-century Americans.

Yet, the obsolete expression is among the first to slip from the mouths of African immigrants when discussing how homosexuality is viewed back home.

"It's taboo. It is not talked about," says Ndubisi Obiorah, a human rights lawyer and Nigerian national.

Then, as if repeating for emphasis, he adds, "There's a very strong traditional social taboo against it."

So strong, in fact, that gay sex in Nigeria is a felony that carries a maximum 14-year prison sentence.

Nothing is more frowned upon there – and in most other African nations – says Obiorah, "short of incest."

Combine those powerful cultural prohibitions with traditional Christian notions about sin, and it comes as little surprise that a Nigerian fundamentalist preacher would choose a controversial passage from the Old Testament book of Leviticus – referring to homosexuality as an "abomination" – to kick off his campaign bringing "the

word of God" to Staten Islanders via billboards in St. George and Port Richmond.

After local politicians and gay community leaders roundly condemned the signs, the media company that owns the billboards promptly replaced them with new ads.

Still, the preacher insists his biblical message is part of the right prescription to help cure America's social ills, and, he says, his heritage has nothing to do with it.

"I'm not influenced by that," says the Rev. Kristopher Okwedy, a self-described "Bible-believing Christian" who immigrated to Staten Island 10 years ago. "I see myself as a Christian first and foremost. I don't speak as an African. I just happen to be from Africa."

Resolutely, he continues: "I have a newfound tradition and culture and it's based on the word of God. It is my standard. It is my measuring stick. My acts, what I do or don't do, I measure against the word of God, not the African culture . . . Just about every ethnic tradition I have, I count as lost."

What's more, the Rev. Okwedy, pastor of the 2-year-old nondenominational Key Word Ministries in Mariners Harbor, claims ignorance when it comes to his homeland's anti-homosexuality measures.

"I don't know about any law of that nature," he says. "During my 27 years in Nigeria I never heard about anybody being persecuted or put in jail for that.

Indeed, Obiorah says, he has firsthand knowledge of just two prosecutions under the law for all of last year in the west African nation of 120 million. Fifty percent of

Nigerians are Muslim and 40 percent Christian, with the remainder following indigenous beliefs.

"The police do not go out actively seeking to arrest homosexuals," says Obiorah, who works for the Manhattan-based Human Rights Watch. "Their general policy is to ignore homosexuality as long as it is kept underground."

Gay activity can be so clandestine in Nigeria – and many regions throughout the continent – that one local Roman Catholic priest even questions its very existence there.

"When you talk of homosexuality in Africa as a whole, there are taboos, unwritten laws," that, because they are derived from natural law, are much stronger than governmental laws, says the priest, who comes from Nigeria and asked not to be identified.

"Homosexuality is not even in the culture," he states emphatically. "The society will not allow it."

Willis Logan, director of the Africa Office of the National Council of Churches in Manhattan, believes that because of the deep taboo, Nigeria as a nation has not embraced an "open, public conversation" on homosexuality, which might keep some in the dark regarding the government's official stance.

Despite the Rev. Okwedy's claim that his decision to kick off the North Shore Bible campaign with the contentious verse from Leviticus is not informed – at least in part – by his cultural background, some in the Island's blossoming African-immigrant community believe it could not be otherwise.

"Africans are strong, committed in what they believe in," says Togba R. Porte, President of the Staten Island Liberian Community Association. "It gives them more of a desire, more of a courage to speak out about what they believe in."

According to the priest, African immigrants may be so "shocked" and "surprised" by America's frank public discourse on homosexuality, they sometimes handle their extreme unease with the popular culture by disassociating from it entirely.

And some may go even further.

"The guy with the billboards, that may be his way of dealing with it," the priest speculates.

The Rev. Okwedy maintains that just isn't so.

"I believe that this country is the greatest country on the face of the Earth," he says. "It is the only country that creates an environment for all peoples of all colors to excel . . . The primary reason that that is, is because the founders of this country ascribed to the word of God."

As to the citywide stir created by his billboards, he says: "The word of God has this cutting edge. It cuts deep. It is like having a surgery without anesthesia."

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*"I have a newfound tradition and culture and it's based on the word of God. It is my standard. It is my measuring stick. My acts, what I do or don't do, I measure against the word of God, not the African culture."* –
Rev. Kristopher Okwedy

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New York Post, Sunday, March 12, 2000

**A most hateful way to stifle free speech**

ROD DREHER

Does free speech have any place on Staten Island? Not if you believe in the Old Testament – which is to say, the Hebrew Bible – or adhere to Islam or any other religious faith that prohibits homosexuality.

On Staten Island, they expect you to shut your trap, or else stand accused of being a hateful bigot. In fact, gay leaders, civic officials and businessmen will shut your trap for you, all in the name of tolerance.

The same crowd that lectures you to be forebearing when a public art museum desecrates an image of the Virgin Mary will tell you you have no moral right to quote from your own holy scripture in public.

So learned the Rev. Kristopher Okwedy last week, when he rented space on two Staten Island billboards to post a Bible verse, Leviticus 18:22, which reads, "Thou shalt not lie with mankind as with womankind: it is abomination."

Hundreds of millions of devout people the world over believe this and have for millennia. Quite a lot of them are so inconsiderate as to live in New York City.

It is not illegal – yet– to hold or state this view. But outraged Staten Island gay leaders rose up to condemn the billboard as evidence of "hate." Borough President Guy Molinari joined in the chorus of condemnation, and the billboard owner ripped the offending Bible verse down.

Scapegoated by the borough government and others for speaking out about his religious beliefs, Okwedy, 37, a born-again pastor from Nigeria who ministers to the inner-city poor, is now receiving death threats from the tribunes of tolerance.

"Somebody called me from a city office phone" – Okwedy has Caller ID – "and told me they were going to kill me, that I was a nigger and a bastard. Another person said they were going to come after me when this cools down and throw acid in my face."

A supporter suggested he contact the American Civil Liberties Union to fight the billboard company in court. Okwedy thinks that's futile.

"I don't think the ACLU is for Christians," he sighed.

Okwedy has obviously learned a lot in his 10 years in America. He has surely observed how quick gay activists are to employ the word "hate" to impugn the motives of those who disagree with them and to discredit their opponents' actions.

That majority of California voters who balloted against gay marriage on Tuesday, did so out of "hate," we are told. Dr. Laura Schlessinger, an Orthodox Jew who has the audacity to actually believe her religion, is excoriated as "the Queen of Hate Radio" for voicing disapproval of homosexuality. And on and on.

This is the bully tactic used by self-absorbed adolescents throwing a temper tantrum because they can't persuade their parents to agree to their demands: "You *hate* me! You *hate* me!"

But it is proving a brilliant political strategy. As soon as a dissenting opinion is labeled "hate," it need not be countered with reason, and those who hold that opinion need not be taken seriously – except inasmuch as they are a threat to decency and order and must be suppressed.

*Gay activists are quick to employ the word "hate" to impugn the motives of those who disagree with them.*

The presumption is that no one can object to homosexuality for any reason other than uncut malice. This fails to consider that orthodox religious faithful believe moral and theological truth exists outside mankind's will.

That truth is for us to discern, not create. And often the moral truths taught by religion will speak prophetically to the community at large.

"The word of God is not just there to make you feel good," Okwedy says. "It's there for correction, too."

Nowadays, almost everyone agrees that the courageous black ministers who led the civil-rights movement were indeed prophets of a just cause. Back then, Southern segregationists tried to silence those ministers by denouncing them as "communists" trying to upset the peace and saying they had no right to speak out as religious believers on political matters.

Those Southerners were wrong, not only in their support of segregation but in their views on the proper place of religion in public life. Today, those Northerners clamoring for pastor Okwedy to be silent should recognize that the rights of religion to challenge secular orthodoxies are not contingent upon whether or not religion supports political goals of the left or the right.

They do not have to agree with Okwedy. If their conscience demands it, they should try to convince him (and everyone else) that he's wrong. They do not have the moral right to put on the rhetorical jackboots to demonize Okwedy and his point of view, particularly when he speaks for so many.

In his 1993 book, "The Culture of Disbelief," Yale law professor Stephen Carter argues that liberal democracy is ill-served by haranguing diverse voices like Okwedy's out of the public square.

"What is needed," writes Carter, "is a willingness to *listen*, not because the speaker has *the right voice* but because the speaker has the *right to speak*.

"Moreover, the willingness to listen must hold out the possibility that the speaker is saying something worth listening to; to do less is to trivialize the forces that shape the moral convictions of tens of millions of Americans."

■ *E-mail: dreher@nypost.com*

Advance, March 13, 2000

**Prayer vigil held to protest anti-gay billboards**

■ Islanders call for tolerance and continued watchfulness in the face of bigotry.

By LESLIE PALMA-SIMONCEK
ADVANCE RELIGION EDITOR

Close to 90 people ventured out in the rain yesterday morning to attend a prayer vigil celebrating the removal of a billboard quoting the Bible on homosexuality, and to encourage continued vigilance.

The billboard on Bay Street in St. George, where the vigil was held, and an identical one on Decker Avenue in Port Richmond, showed up on March 3 giving four different translations of a verse from Leviticus often used to demonstrate that homosexuality is unacceptable from a biblical perspective.

The signs were covered over with new ads on Thursday after gay activists labeled them a bias attack and Island elected officials expressed concern that they could promote violence against homosexuals.

"This time, the good people of Staten Island did something," said Tom Hamilton of the Staten Island Independence Party.

The Rev. Kristopher Okwedy, founder of KeyWord Ministries in Mariners Harbor, paid $2,000 for the signs to PNE Media, a Union, N.J. company that ultimately called for them to be covered because no sponsoring organization was identified on the billboards.

"His $2,000 would have been better spent by a donation to Project Hospitality or the AIDS Task Force," said James Smith, a St. George resident who is president of Lambda Associates of Staten Island, an educational and social organization for gay men and lesbians.

Rev. Okwedy, in a telephone interview yesterday, said he has received death threats since his identity became public, and on Saturday the Police Department's bomb squad was at his home investigating a package sent with no return address. The package contained gay and lesbian magazines.

"What's at issue is not homosexuality, it's unbelief," Rev. Okwedy said. "People refuse to believe the word of God."

During his worship service yesterday, the Nigerian-born pastor told his members that, just like police officers who are licensed to carry a gun, "I am licensed to use the word of God."

He said the billboards were not a condemnation of homosexuals, but of the sexual acts involved.

"I am not against a group of people," he said. "God makes a distinction between the people and the act."

Yesterday's vigil, sponsored by 21 individuals and organizations, was an opportunity "for us to unite and say it's wrong," said city Public Advocate Mark Green.

"Words can be hammers," Green noted as he urged continued resistance against racism based on "race, religion and now, sexual orientation."

Councilman Jerome X. O'Donovan, a Democrat whose North Shore district includes both billboard sites, climbed the ladder used as an impromptu podium to say, "I know the Bible too, and there's a passage in it called the Golden Rule that says 'do unto others as you would have them do to you.'

"This is exactly the opposite of the Golden Rule," he said of the billboards. "This should not happen ever again."

Also speaking at the vigil were City Council Members Stephen DiBrienza of Brooklyn and Christine Quinn of Manhattan.

Lee Covino, representing Borough President Guy V. Molinari's office and his Anti-Bias Task Force, said if there's a "silver lining" to be found to the incident, it can be seen in how far Islanders have come in accepting and welcoming diversity.

"It's important to be vigilant and important to be inclusive," said Covino. "I'm hoping we don't have to meet again under similar circumstances."

A spokesman for North Shore Assemblywoman Elizabeth Connelly said the assemblywoman would continue to press for hate-crime legislation on the state level.

Many speakers touched on the importance of keeping up the fight.

Owen Pahl Greene, a Manhattan resident who says he "just happens to show up every time there's a gay issue," urged those gathered to "put [their] money where [their] mouths [are]."

Greene said he stamps all his money with the words "gay money" in pink ink, and he urged others to follow suit. He also suggested contacting, or boycotting, the companies whose advertisements ran alongside Rev. Okwedy's billboard.

"The company that sold him the space also has to be made aware that this is unacceptable," Greene said.

"Eternal vigilance is the price of liberty," observed New Brighton resident Nick Dowen.

"If you attack any single group, you attack us all," said Concord resident Tom Schroeder. "And that is not acceptable."

Noting that many Christians believe in the inerrancy of the Bible, the Rev. Hattie Smith Davis said, "I think we should not judge one another."

"I believe that God has said we have to live from Genesis through Revelation," said Rev. Davis, who came on her own accord and did not represent any church. "But speaking from my heart, I believe every one of us has something in our lives . . . that I'm sure God is not pleased with. I do know that God is a forgiving God. Let God do the judging. You guys should live in peace." she said, referring to activists.

Yolanda and Matt Cohen, who were married Saturday night at Congregation Temple Emanu-El in Port Richmond, went to the rally to lend their support.

"We feel very strongly about this," said Matt Cohen. "We couldn't think of a better way to celebrate our first day as a couple."

Bonita Nathan Sussman, coordinator of the Staten Island HIV Care Network and one of the organizers of yesterday's event, said everyone who attended was asked to fill out a form that identified their religion and gave their feelings about the billboards.

Reading each one aloud, she found statements of support from Roman Catholics, Jews, Episcopalians, Lutherans, Baptists, Presbyterians, atheists and those who said they had no religious affiliation.

A statement of support from the Staten Island Rabbinical Association, which represents some of the Island's Reform and Conservative rabbis, also was read.

"This reinforces the importance of coalition," Mrs. Sussman said as the 90-minute rally broke up.

The Rev. Dr. George McClain, a minister in the United Methodist Church and former executive director of the Methodist Federation for Social Action, closed the gathering with a prayer and a nudge to his clergy colleagues to use the issue of the billboards as "a teachable moment."

He said frank discussions can be "a way of helping us understand more clearly what the core of our religious traditions are."

Rev. McClain also urged "graciousness" toward Rev. Okwedy and suggested that the activists find ways to engage in dialogue with him.

Advance, March 17, 2000

**Clergy to rally for pastor, his anti-gay stance**

ADVANCE STAFF REPORT

Clergy and members of 17 churches on Staten Island and in Brooklyn will rally tomorrow in support of the Rev. Kristopher Okwedy, whose billboards carrying a biblical message against homosexuality stirred such controversy that the signs were removed.

James Howarth, a member of Calvary Assembly of God in Eltingville, is organizing the rally, which will begin with a prayer service at 9 a.m. in Calvary Assembly.

The group will then gather at 11 a.m. on the steps of Borough Hall in St. George.

"There we will publicly proclaim our support for God's word, our support for Pastor Okwedy and our support of the freedom of speech to say so," Howarth said.

Rev. Okwedy's billboards went up in St. George and Port Richmond on March 3, drawing an immediate response from the Island's gay community and prompting reaction from several of the Island's elected officials.

The company that owns the billboards, PNE Media of Union, N.J., called for the signs to be covered over on March 8, saying they violated company policy by failing to identify the sponsoring organization.

Rev. Okwedy, founder of KeyWord Ministries in Mariners Harbor, said he paid $2,000 to have the signs displayed for 31 days. He said his right to free speech was violated when the signs were covered with new ads.

Ninety people attended a rally Sunday in support of the Island's gay and lesbian community.

Calvary Assembly of God is located at 4055 Richmond Ave.

Advance, March 30, 2000

## City launching a new attack on hate crimes

- $5 million initiative will create a task force doubling the number of cops investigating bias incidents

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By FRANK WILLIAMS
ADVANCE STAFF WRITER

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Mayor Rudolph W. Giuliani is expected to announce today a $5 million initiative that will create a Hate Crimes Task Force and double the number of police officers probing bias crimes.

The 40-member police officer task force will replace the Police Department's current 20-member citywide Bias Crimes Unit.

Borough President Guy V. Molinari heralded the mayor's announcement during a meeting last night of Borough Hall's Anti-Bias Task Force.

The mayor hopes the new unit will dramatically enhance the crime-fighting and investigative ability of the Police Department to solve and prevent future bias incidents, according to the borough president.

"I think it's a positive step," said Deputy Inspector Kathleen Kearns, who attended last night's meeting at Borough Hall. "Anything they can do to add to it is a win-win situation."

"Anything that would reduce hate crimes would be beneficial, but I'll have to get a better feel for what [the mayor] is going to do before I can make a judgment," said

Edward Josey, president of the Staten Island branch of the NAACP.

"Obviously, there is a need to double the amount of officers," said Camille Zarelli, president of the Staten Island Civic Organization. "It will make offenders understand that this will not be tolerated. We will not tolerate intolerance."

The recent controversy over two anti-gay billboards on the North Shore, the boroughs' 25 recorded hate crimes last year and its two so far this year, and concerns about educating the Island's youth against prejudice headlined the anti-bias panel's discussion. Forty-two of the panel's 80 members showed up for the meeting.

Molinari opened the meeting with a personal reflection on the presence of hate crimes on Staten Island.

"During my State of the Borough recently, I told you how well everything is working here, but all the decency here is lost if we don't have a community that loves each other," said the borough president. "I like to think that here on Staten Island we can do better and show the rest of the country what a community can do by reaching out to each other."

Molinari said, "Now we are a more diverse community and we're richer for it."

He said he believes hate crimes are caused by fear and ignorance.

"A special responsibility rests on my shoulders and I say this because I believe it – I'm not running for office again," said Molinari.

Molinari also discussed the rejection by Community Board 3 Tuesday night of a group home fro six adults with developmental disabilities in Greenridge. He's asked the board to reconsider its vote.

"Those of us in leadership positions have to stand up to this and show the way," he said.

"People were grasping for excuses to oppose it," Molinari said of the raucous Board 3 meeting, where nearly 200 audience members cheered when the board voted against the proposal. "I've seen neighborhoods torn apart by this."

Last night's discussion did not specifically touch on recent racially charged cases in the city, such as the police shooting of Patrick Dorismond, the acquittal of police officers charged in the killing of Amadou Diallo, or the conviction of two Staten Island cops in the Abner Louima sexual torture case.

Instead, debate centered on two anti-gay North Shore billboards that were posted, and quickly covered up, earlier this month.

The borough president defended his condemnation of the billboards, which carried biblical messages condemning homosexuality. Molinari explained that he didn't order the billboards covered up, but instead asked to meet with PNE Media, the company that owns the boards, and the Rev. Kristopher Okwedy, of KeyWord Ministries, who put up the messages. He explained to both how people in the community found the signs offensive.

"[Rev. Okwedy] has a constitutional right to put up what he wants, but I also have an obligation to stop the escalation of what people in the community find offensive,"

said Molinari. "I'm trying to keep peace, and keep people from hurting each other."

Eventually, the signs were taken down by PNE Media because the company requires that the name of the person or organization responsible for the message be seen on the board. Rev. Okwedy's name did not appear on the board.

But the Rev. David Beidel, pastor of the New Hope Community Church in New Brighton, used the word of God to defend Rev. Okwedy's anti-gay billboards.

"I know [Rev. Okwedy]. I've prayed with him and he's a good guy trying to do the right thing," said Rev. Beidel. "He believes in the word of God. You know, the truth is the truth. Sometimes it's like a hammer – a powerful force intended to build. If I throw out the hammer, I can't build. I don't want to be criticized in the papers as a Bible freak, but the Bible is the root of Western civilization's codes and what was on the billboard is in there."

Daniel Master, chairman of the borough's Anti-Bias Task Force and Molinari's counsel, agreed that Rev. Okwedy has the right to "say what he wants," but not everywhere.

"I feel that in a multicultural society, someone shouldn't act so confrontationally," said Master.

"We have to respect each other and deal with sins ourselves," said Joseph Valentin, president of 122nd Precinct Community Council.

Dr. Mohamed Yousef, a computer science professor at the College of Staten Island and an adherent of Islam, said that the controversy is relative.

"In the Koran, homosexuality is not approved of, but this isn't what the issue is about. If I put up a billboard that said, 'Jesus is not the Son of God, but he is a prophet' – because that is what I believe – it would be offensive to many in the community," said Yousef.

"If you go deep into any religion and take away everything manmade, you come to the same truth," said Veera Konka, of the Asian-American Coalition of Staten Island. "Jesus says the same thing that is in the Bhagavad-Gila which was written 3,000 years before Jesus. Fundamentalism always brings about confrontation. We have to look at each other and say, 'There's a fellow citizen.'"

Master reported there were 25 bias crimes on Staten Island that year. There were also 25 bias crimes in 1998, a significant drop from the 47 in 1997.

There were 16 bias-related arrests last year and 10 of the suspects were under the age of 16, he said.

"It's the 13-, 14-, 15-, and 16-year olds that are committing these crimes," said Master. "So we are focusing our attention in the schools."

"The problem is the parents and the education that these kids are getting," said Dr. Ronald J. Sheppard, of the College of Staten Island. "Many of us are taught that our own religions are right and the rest are wrong. We are taught to believe in our own sameness. But teach them that African-Americans are the same as everyone else – with the same problems – same with Jewish people. We have to reach out of withdraw to sameness. Society's fate will be dependent on this."

Index No. 00 CV 5426 (NG)(CLP)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KRISTOPHER OKWEDY and
KEYWORD MINISTRIES,

Plaintiffs,

- against -

GUY V. MOLINARI, CITY OF
NEW YORK, PNE MEDIA LLC,

Defendants.

**CITY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

(Filed Feb. 24, 2005)

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* * *

This portion of the Court's decision was affirmed by the Second Circuit, which stated: "Plaintiffs have alleged no facts that suggest that Molinari's purposes or the purpose of the New York law was to single out plaintiffs' religious expression." Summary Order at 4, Exhibit A. In fact, the Second Circuit noted that "plaintiffs acknowledged that Molinari acted pursuant to the general policy against 'intolerance' and 'bigotry' expressed in New York law and the New York City Administration Code § 8-101." *Id.* The City defendants' actions had the intended secular effect of curtailing intolerant pronouncements to the general populace of Staten Island.

Nothing was revealed in discovery to suggest anything different. In fact, it was definitively established through both deposition testimony and documents that PNE made its decision to remove the billboards hours before Borough President sent his March 8th letter. As a consequence, plaintiffs have dismissed the former Borough President as a defendant in this action and have withdrawn their claim of a violation of their free speech rights based on this letter. *See* transcript at 5, 8, 24-25, Exhibit B. Thus, it is eminently clear that the government placed no burden whatsoever on plaintiffs' practice of their religious beliefs, nor interfered with any of their rights under the First Amendment.

Having failed in their individual Free Speech, Free Exercise and Establishment Clause claims, plaintiffs now assert that Molinari's letter, when taken together with the City defendants' interrogatory responses, the "investigation" conducted by the police department's Hate Crimes Task Force, and notations on press clippings in the Borough President's office "demonstrate government disapproval of Plaintiffs' religious beliefs concerning homosexuality."

Plaintiffs' Motion for Leave to File Second Amended Complaint and Memorandum of Law in Support Thereof ("Plaintiffs' Memo") at 18. However, that is simply not the case.

The City defendants' responses to plaintiffs' Interrogatories in no way express "government disapproval of Plaintiffs' religious beliefs" and cannot be a basis for creating a new "hybrid" claim or resurrecting already dismissed claims. First, plaintiffs point to defendants' response to Interrogatory No. 12, which reads as follows:

> **Interrogatory No. 12:** With respect to the March 8, 2000 letter, please identify the factual and/or legal basis for the statement, "this message conveys an atmosphere of intolerance which is not welcome in our Borough."
>
> **Objection and Response to Interrogatory No. 12:** Statements such as those in plaintiffs' billboards convey bigoted views of homosexuals. Such messages, whether targeted against a racial or ethnic group, against immigrants, or against individuals of a particular sexual orientation, foster and condone intolerance within the community and can lead to unlawful discriminatory conduct and behavior.

*See* Defendants' Responses and Objections to Plaintiffs' First Set of Interrogatories Propounded to Defendant City of New York, dated January 16, 2004, annexed to Biberman Decl. as Exhibit N. Plaintiffs assert that this Interrogatory Response indicates that "the City holds the position that the Holy Scriptures, in particular Leviticus 18:22, 'convey bigoted views against homosexuals.'" Plaintiffs' Memo at 10. The City's interrogatory response expresses no such position. The City's response that

plaintiffs' message is of the type of statement that conveys "bigoted views of homosexuals," is no different from Borough President's Molinari's statement in his March 8, 2000 letter in which he found "th[e] message unnecessarily confrontational and offensive" and "convey[ing] an atmosphere of intolerance which is not welcome in our Borough." Molinari Letter, Exhibit E. And, as such, it no more expresses "hostility toward religion" or "disapproval of plaintiffs' religious beliefs" than did the Borough President's letter itself. The interrogatory response was nothing more than the explanation that plaintiffs

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SUPREME COURT, U.S.

No. 06-676

**In the**
**Supreme Court of the United States**

KRISTOPHER OKWEDY and
KEYWORD MINISTRIES, INC.,
*Petitioners*,

-against-

GUY MOLINARI, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the City of New York violated the Establishment Clause when one of the City's five borough presidents and City attorneys criticized as intolerant petitioners' anonymous billboards containing biblical quotations describing homosexuality as sinful behavior?

## PARTIES TO THE PROCEEDING

The petition's caption inaccurately identifies the respondents. Respondent is the City of New York ("City"), as petitioners acknowledge (Pet. at ii & n.1).

The defendants listed on the petition's cover as respondents have been dismissed from the case, with petitioners' consent. Guy V. Molinari, former borough president of the New York City Borough of Staten Island, was dismissed in the District Court (*infra* p. 2). PNE Media, LLC (PNE) settled with petitioners while the case was pending in the Court of Appeals, and the suit against it was discontinued (C.A. Docket Sheet, entries dated Mar. 27 & Apr. 6, 2006).

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No. 06-676

**In the**
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KRISTOPHER OKWEDY and
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*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

# BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

This case has changed course substantially since it began. Petitioners, Rev. Okwedy and Keyword Ministries, Inc. (collectively referred to as "Okwedy"), initially complained that their First Amendment rights under the Free Speech, Free Exercise, and Establishment Clauses were violated by Guy Molinari, then president of the Borough of Staten Island. Mr. Molinari wrote to PNE Media, Inc. (PNE), owner of the billboards where Okwedy's messages were posted, complaining about the billboards and asking the owner to contact his office. *See generally Okwedy v. Molinari*, 333 F.3d 339, 341–42 (2d Cir. 2003).

The District Court dismissed the complaint for failure to state a claim. *Id.* at 342. The Court of Appeals affirmed as to the Free Exercise and Establishment Clause claims, *Okwedy v. Molinari*, 69 Fed. Appx. 482, 484–85 (2d Cir. 2003), but held that it was premature to dismiss the Free Speech claim because "Molinari's letter could be found to contain an implicit threat of retaliation if PNE failed to accede to Molinari's requests." *Okwedy*, 333 F.3d at 344.

After remand, evidence produced during discovery established that Molinari's letter had nothing to do with PNE's decision to remove Okwedy's signs (C.A. App. at A146, A164, A166). Okwedy agreed to dismiss his suit against Molinari (*id.* at A256–57).

This left the City as the only remaining governmental defendant. Okwedy now pressed a newly added claim that Molinari's criticisms of Okwedy violated the Establishment Clause and were undertaken to implement the City's anti-discrimination policy, stated in § 8-101 of the New York City Administrative Code (Pet. App. at 25). Section 8-101 is the policy statement at the beginning of the City's Human Rights Law. *See* N.Y.C. Charter § 900 (defining Human Rights Law). The policy statement deplores the socially corrosive effects of various types of invidious discrimination, including discrimination based on sexual orientation.

Okwedy's only claim in this Court is that because his message was grounded in his religious beliefs, the City violated the Establishment Clause when Molinari and the City's attorneys criticized Okwedy's characterization of homosexuality as sinful (Pet. at i, 2–3 & n.2). While not relevant to his stated constitutional issue, the petition alleges absence of

police concern about threats against Okwedy, stating that the anti-bias officers who visited his church did not ask about those threats (Pet. at 5 & n.4); however, the record contains police reports showing that local police officers responded when Okwedy's wife reported delivery of a suspicious package. When it turned out to contain "graphic homosexual magazines" (C.A. App. A97), police investigated in an unsuccessful effort to track down the sender (*id.* at A233–47).

## REASONS WHY THE PETITION SHOULD BE DENIED.

### I. THIS CASE DOES NOT PRESENT THE ISSUE RAISED BY PETITIONERS.

Since the City is the only remaining defendant, Okwedy needed to show that the allegedly unconstitutional criticisms of his billboards constituted City policy. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 478–81 (1986). However, as the Second Circuit explained, the critical statements could not be attributed to the City. They were made by a borough president who was not implementing the City's anti-discrimination policy and by City attorneys in legal argument and interrogatory responses. *Okwedy*, Pet. App. at 3–4; C.A. App. at A189 (reprinted in City Legal Memorandum, Pet. App. at 59). As the District Court noted, Borough President Molinari had no formal role in carrying out the City's Human Rights Law, and he was only vaguely aware of its contents. *Okwedy v. Molinari*, Pet. App. 7, 16 (E.D.N.Y. 2005), *aff'd*, Pet. App. 1; *compare id. with Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1118–19 (9th Cir.) (governing body sent letter and adopted formal resolution condemning newspaper advertisements calling homosexuality sinful), *cert.*

*denied*, 537 U.S. 886 (2002). Since no City action is at issue, Okwedy would not have a claim in this lawsuit even if his constitutional arguments were correct.

## II. PETITIONERS HAVE NOT SHOWN ANY CONFLICT BETWEEN THE SECOND CIRCUIT AND OTHER CIRCUITS.

There would be no reason to grant the petition even if the statements criticizing Okwedy were the City's acts. Reduced to its essentials, Okwedy's complaint is that the Establishment Clause precludes New York City from criticizing statements at odds with its anti-discrimination policy when those statements are grounded in the speaker's religious beliefs. Section 8-101 deplores "groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on . . . sexual orientation . . . ." It says nothing about religion, and Okwedy concedes that government may "enshrine tolerance as the highest virtue" (Pet. at 13). However, Okwedy contends that government may not "further its interest in preventing discrimination by condemning religious beliefs and curtailing religious expression" (Pet. at 7).

Curtailment of expression is not at issue here. Petitioners' Question Presented complains only about criticism, not suppression (Pet. at i). Section 8-101 does not regulate speech, and Okwedy's claim that Molinari used the coercive powers of his office to pressure PNE into taking down Okwedy's billboards was dismissed on consent. The most Okwedy can claim is that a borough president and City attorneys criticized his attitudes towards homosexuality as bigoted and intolerant.

Okwedy has not identified any conflict between the Second Circuit and others regarding the claimed Establishment Clause violation. On Okwedy's first appeal, the Second Circuit held that there was no Establishment Clause violation. The Court approved the District Court's conclusion "that Molinari's conduct comports with the requirements of the test set forth in *Lemon v. Kurtzman*," 403 U.S. 602 (1971). *Okwedy*, 69 Fed. Appx. at 484; *accord Okwedy*, Pet. App. at 5. The District Court had explained that the City's anti-discrimination laws were secular in purpose and did not run afoul of the Establishment Clause because they offended some individuals' religious beliefs. *Okwedy v. Molinari*, 150 F. Supp. 2d 508, 519–20 (E.D.N.Y. 2001), *aff'd*, 69 Fed. Appx. 482, *rev'd in part on other grounds*, 333 F.3d 339. And the District Court concluded that Okwedy's condemnation of homosexuality was not immune from criticism because it was grounded in religion. Indeed, the Court said that special treatment of Okwedy's viewpoint would offend the Establishment Clause's principle of neutrality towards religion. *Id.* at 520.

Okwedy's claim of a conflict is premised on the mistaken proposition that the Second Circuit ruled that government speech about religion will not violate the Establishment Clause unless it involves threats, coercion, or intimidation (e.g., Pet. at 16, 17). The Second Circuit's treatment of Okwedy's Establishment Clause claims is discussed in the preceding paragraph. The Court's references to government threats and intimidation were made in connection with Okwedy's claim—not raised here—that his Free Speech rights were violated when Molinari wrote to PNE, complaining about Okwedy's billboards. *See Okwedy*, 333 F.3d at 342–43; *Okwedy*, Pet. App. at 4.

On Okwedy's first appeal, the Court reinstated his Free Speech claim and remanded it for the District Court to consider whether Molinari had impermissibly coerced PNE into removing Okwedy's billboards. *Okwedy*, 333 F.2d at 344. The claim was later dismissed on consent (*supra* p. 2).

Like the other circuits quoted by Okwedy, Pet. at 17–18, the Second Circuit recognized that government must be neutral in matters of religious doctrine and denominational preference. *Okwedy*, 69 Fed. Appx. at 484–85. The decisions relied on by Okwedy do not suggest that the Establishment Clause is violated when government officials and employees assail a speaker's assertion that homosexuality is sinful. The criticism of Okwedy's message was far less pointed than the condemnation of "'the Religious Right'" contained in a formal Board of Supervisors resolution that one court found did not violate the Establishment Clause. *Am. Family Ass'n*, 277 F.3d at 1119. There, the government not only made the reference quoted above. it linked the advertisers' religious message to a particularly notorious killing of a gay man. *Id.* In the instant case, the critical statements attacked Okwedy's view of homosexuality, but did not assail religion, either in general or as practiced by Okwedy (C.A. App. at A189 (*reprinted in* City Legal Memorandum, Pet. App. at 59)). The Establishment Clause requires that government "must be neutral in matters of religious theory, doctrine, and practice." *Epperson v. Ark.*, 393 U.S. 97, 103-04 (1968). It does not prevent the government from criticizing a religious person's viewpoint on a secular issue.

Debate on many public policies would be stifled if the Constitution prohibited officials from criticizing speakers who take positions grounded in their

religious beliefs. Given the diversity of religious tenets and practices in our country—diversity encouraged by long-held values and protected by the Constitution—many government policies offend someone's religious principles. Just as the Establishment Clause is not violated when government conduct "happens to coincide or harmonize with the tenets of some or all religions," *McGowan v. Md.*, 366 U.S. 420, 442 (1961), it is not violated when government adopts and defends a secular policy at odds with someone's religious principles.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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